No. 22565

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

PACIFIC CAR AND FOUNDRY COMPANY,

Petitioner,

vs.

HONORABLE MARTIN PENCE, UNITED STATES DISTRICT JUDGE, DISTRICT OF HAWAII, and L. C. O'NEIL TRUCKS PTY. LIMITED,

Respondents.

MEMORANDUM IN SUPPORT OF PETITION FOR LEAVE TO FILE PETITION FOR MANDAMUS

CHUNG, VITOUSEK, CHUCK & FUJIYAMA
ROY A. VITOUSEK, JR.
304 INTERNATIONAL SAVINGS BUILDING
1022 BETHEL STREET
HONOLULU, HAWAII 96813

HELSELL, PAUL, FETTERMAN, TODD & HOKANSON
RICHARD S. WHITE
1610 WASHINGTON BUILDING
SEATTLE, WASHINGTON 98101

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I. JURISDICTIONAL STATEMENT

This court has jurisdiction of defendant's petition under 28 U.S.C. §1651 (the "All Writs Act"). Jurisdiction of the District Court was invoked under 15 U.S.C. §15 (Section 4 of the Clayton Act).

II. QUESTIONS PRESENTED

This petition raises several questions concerning the rights, under 28 U.S.C. 1406(a) and 1404(a), of a litigant sued in a far-off district with which it has, at most, minimal contacts, unrelated to the claims upon which the action is brought. The facts out of which the questions emerge are not in dispute.

The questions presented, the action of the District Judge and our views thereon may be summarized:

1. Does defendant, a Washington-based corporation, which manufactures trucks in Washington, California and Missouri, transact business through its distributors in Hawaii for purposes of amenability to suit there under Section 12 of the Clayton Act, 15 U.S.C. §22? The District Judge upheld out-of-state service on defendant at its headquarters in Renton, Washington on the ground that the defendant transacted business in Hawaii through its distributors in that state. In our view the District Judge, in reaching this conclusion, misread the distributors' agreements, copies of which are in the record (R. 35-42), drew unwarranted inferences concerning the nature and scope of defendant's activities and misapplied the principal precedents, including such decisions of this court as Courtesy Chevrolet, Inc. v. Tennessee Walking Horse Assn., 344 F.2d 860 (9th Cir. 1965); L. D. Reeder Contractors of Arizona v. Higgins Industries, 265 F.2d 768, 774 (9th Cir. 1959) and Eastland Construction Co. v. Keasbey & Mattison Co., 358 F.2d 777 (9th Cir. 1966).

2. Where a Washington truck manufacturer's only contacts with Hawaii have been through its independent distributors there, and the claims against it do not arise from conduct in Hawaii, should an antitrust action brought by an Australian corporation, claiming improper termination of its right to sell defendant's trucks in Australia, be transferred from Hawaii to Washington on

defendant's motion under 28 U.S.C. §1404(a)? The District Judge in effect refused to exercise his discretion because "at this stage of the litigation it is impossible for this court to ascertain with any definitive approximation the burden which defendant may incur." (R. 112). In short, our position is that the entire purpose of Section 1404(a) would be thwarted if a defendant were forced to incur the burdens and expenses before its motion were definitively considered. The District Judge here had before him detailed facts concerning the burdens which trial in Honolulu would inflict on defendant. By the uncontroverted affidavit of the chairman of its board, defendant:

(a) listed 45 potential witnesses residing in the Western District of Washington, identifying each as to his knowledge of the facts (R. 26-30);

(b) listed eleven more potential witnesses, for whom trial in Hawaii would be a burden (R. 30-31);

(c) estimated that the cost of transporting witnesses to Hawaii for trial would be between $12,000 and $15,000, and that the subsistence of these 56 witnesses in Honolulu for an extended trial would "be extremely expensive" (R. 31).

(d) stated that, based upon the fact that most of the key corporate officials of defendant were vital witnesses, "If trial of this case were to be held in Honolulu, it would severely disrupt the operations of defendant..." and

(e) set forth detailed facts concerning the location and volume of corporate records which would probably have to be moved to Honolulu (R. 31-34).

3. Should mandamus be granted to review denial of defendant's motion to quash return of summons, dismiss or transfer under 23 U.S.C §1406(a), or transfer under 28 U.S.C. §1404(a)? The very complete record below presented to the District Judge all of the facts relevant to decision of the motion. Instead of deciding the forum non conveniens part of the motion in defendant's favor, in accordance with the facts and the law, the District Judge in effect deferred action on it to see whether defendant really would incur the irreparable damage it sought to avoid. In deciding whether defendant was amenable at all to suit in Hawaii, the District Judge misinterpreted the undisputed facts and misapplied well-established legal principles. In these circumstances defendant is entitled to mandamus. Otherwise, it may win the lawsuit but spend an unnecessary hundred thousand dollars or more in unreimbursable costs, to defend itself thousands of overwater miles from home.

With our petition we have filed, with an affidavit of counsel, true copies of those portions of the record in the District Court deemed pertinent to the foregoing questions. These consist of pleadings (herein "R. ___"), including the order denying our motion (R. 106-113), and the transcript of the argument on the motion (herein "Tr. ___").

Before stating the legal reasons which support our petition, we shall summarize the pleadings and proceedings to this point and

the facts which bear upon the issues presented.

III. RESUME OF PLEADINGS AND PROCEEDINGS

On August 31, 1967, a complaint seeking $8,250,000 in damages under Sections 1 and 2 of the Sherman Act was filed against petitioner as sole defendant in the District of Hawaii (R. 3-9). Petitioner (herein called defendant) manufactures two lines of trucks, Kenworth and Peterbilt, through separate divisions of the company. The Kenworth Division, which has factories in Seattle, Washington and Kansas City, Missouri, and the Peterbilt Division, which has a factory in Newark, California, are named as "co-conspirators", along with Robert D. O'Brien, chairman of defendant, a resident of Seattle; Kenworth Motor Trucks Pty. Ltd., an Australian subsidiary of defendant; Robert E. MacGilvra, an Australian resident who is managing director of the subsidiary, and Cameron Kenworth Pty. Ltd., an Australian distributor of Kenworth trucks (R. 4).

Plaintiff was organized on May 31, 1963 under the laws of New South Wales (R. 64) "for the purpose of selling in Australia Peterbilt trucks and truck parts. On July 1, 1963, it entered into an exclusive Distributor's Contract with Peterbilt Motors Company Division of Pacific." (R. 6). According to plaintiff, it was notified in December, 1965 that Peterbilt trucks would no longer be supplied to the Australian market (R. 48).

In January, 1966, plaintiff was appointed a distributor of Kenworth trucks and parts in Australia (R. 6, 48). In early 1967, plaintiff's franchises were terminated by defendant (R. 6, 48). According to plaintiff's complaint the termination, stemming from a

conspiracy which began "some time prior to December, 1965", unreasonably restrained the foreign trade and commerce of the United States, contrary to Section 1 of the Sherman Act, and evinced an attempt by defendant to monopolize the exportation of heavy-duty trucks from the United States to Australia, contrary to Section 2 of the Sherman Act (R. 4-9).

With its complaint plaintiff filed a motion to produce under Rule 34 (R. 14-17), calling for inspection of most of the records of defendant and its Kenworth and Peterbilt divisions, back to January 1, 1958 (R. 32). All of the documents were asserted to be relevant to the action (R. 13-22).

Upon plaintiff's representation that defendant resided in Renton, Washington, an order issued allowing service of summons without state (R. 10-12), pursuant to which defendant was served at its corporate offices in Renton. The only reference to Hawaii in the complaint was the bare statement that "Defendant is found and transacts business in the District of Hawaii". (R. 3).

In due course defendant served and filed a motion (1) to quash return of summons or to dismiss the action or transfer it to the Western District of Washington, Northern Division, under 28 U.S.C. §1406(a), or (2) if that motion were denied, for change of venue to that district under 28 U.S.C. §1404(a) (R. 43-45). The grounds were, in short, that defendant did not do business in Hawaii, and, therefore, venue in that district was improper; and, alternatively, that trial in Hawaii would cause defendant great and unjustifiable expense and disruption of business, and

that the interest of justice required transfer of the action. Defendant's motion was supported by the affidavit of its chairman, Mr. O'Brien, to which were attached copies of distributor's contracts between defendant and its Hawaiian distributors (R. 23-42). In opposition to the motion, plaintiff filed an affidavit by its chairman, Laurence C. O'Neil, identifying certain correspondence (R. 60-83), and an affidavit by plaintiff's Honolulu counsel naming six potential witnesses said to be residents of or "connected with" Hawaii (R. 84-87).

Defendant filed reply affidavits by Mr. O'Brien (R. 93-105), by Mr. D. F. Pennell, a vice president of defendant (R. 91-92) and by counsel (R. 88-90).

Defendant's motion was argued before The Honorable Martin Pence on October 23, 1967 (Tr. 1-68). Judge Pence reserved his ruling. On December 26, 1967, an order was filed denying petitioner's motion in all of its alternative forms (R. 106-114).

IV. SUMMARY OF FACTS

A. Facts Relevant to Defendant's Motion to Dismiss or Transfer Under 28 U.S.C. §1406(a) on the Ground That It Does Not Transact Business in Hawaii

Defendant's motion and original supporting affidavit covered its activities for the period from July 1, 1963 to date. The date of July 1, 1963 was selected for two reasons. First, that was the date of the Distributor's Contract between defendant's Peterbilt Division and plaintiff (R. 6, 48, 99). Second, since this action was filed on August 31, 1967, any cause of action

which accrued before July 1, 1963 would be prima facie barred by the statute of limitations (15 U.S.C. §15b)*.

The basic facts, as set out in Mr. O'Brien's affidavit (R. 23-34) are that defendant is, and has been since its incorporation in 1924, a Washington corporation, with its corporate offices located in Renton, Washington, in the Northern Division of the Western District of Washington. Neither defendant nor any of its divisions or subsidiaries has at any time since July 1, 1963:

(a) Been licensed or registered to do business in Hawaii.

(b) Maintained any office in Hawaii.

(c) Had any officer, director, employee or agent who resided in Hawaii.

(d) Owned or leased any real or personal property or maintained any stock of goods in Hawaii.

(e) Maintained any bank account in or financed any transaction through any bank in Hawaii.

(f) Had any licenses or permits from the State of Hawaii or any municipal subdivisions thereof.

(g) Purchased any products in Hawaii.

*"Transacts business" as that phrase is used in Section 12 of the Clayton Act (15 U.S.C. §22), refers back to the time when the cause of action accrued. Eastland Const. Co. v. Keasbey & Mattison Co., 358 F.2d 777 (9th Cir. 1966). Plaintiff's claim for damages could hardly be said in any case to have accrued before July 1, 1963.

No employee of defendant or of any division or subsidiary of defendant makes regular calls on customers within the State of Hawaii. Infrequent goodwill or service visits are made on Kenworth and Peterbilt distributors, generally in response to requests by such distributors (R. 24).

Since July 1, 1963, Peterbilt has had in force contracts with two distributors in Hawaii and Kenworth has had one Hawaiian distributor (R. 24-25). Copies of one of the Peterbilt contracts and of the Kenworth contract were attached to Mr. O'Brien's affidavit (R. 35-42). The other Peterbilt contract is in the same form as the one attached (R. 25).

Neither defendant nor any of its divisions or subsidiaries has or has had any ownership or financial interest in any Peterbilt or Kenworth distributor in Hawaii.

Neither defendant nor Peterbilt nor Kenworth has any control over the location, facilities, financial or other operations of any distributor in Hawaii. Orders obtained by the distributors must be accepted by Peterbilt or Kenworth respectively. Shipments of trucks and parts are made by Peterbilt f.a.s. Oakland or San Francisco, California, and by Kenworth f.a.s. Seattle or Tacoma, Washington (R. 25).

The burden of the affidavit of Laurence C. O'Neil (R. 66-83), chairman of plaintiff, in reply to defendant's motion, was that Robert N. Larkin, former half owner of plaintiff, had resided in Hawaii for eight years until about mid-March, 1963. (See

Exhibit "D" to O'Neil affidavit (R. 72), a letter from Larkin to O'Neil of February 28, 1963, announcing that Larkin would leave Hawaii for Australia on March 19, 1963, and Exhibit "E" to the O'Neil affidavit (R. 73), a letter from Larkin in Australia dated April 3, 1963 to A. R. Gould, then general sales manager of defendant's Peterbilt Division in Newark, California); that Larkin had corresponded from Hawaii to Newark, California in February and early March, 1963, concerning the possibility of establishing a distributorship in Australia (See Exhibits "A", "B" and "F" to O'Neil affidavit (R. 67-70, 74-75); and finally that in 1965, at plaintiff's instance, defendant had talks with representatives of one of its Hawaiian distributors, Honiron, concerning the possibility that the distributor might invest in plaintiff (See Exhibits "I", "J" and "K" to O'Neil affidavit R. 79-83).

In reply to the O'Neil affidavit, defendant filed affidavits, the gist of which was to relate the details of talks with Honiron in 1965, which never got off the ground (R. 91-92), and of the early discussions with Larkin, in Seattle and Newark, California in January and February, 1963 (R. 93-95).

All of the personal discussions between representatives of the plaintiff and defendant and its divisions from the inception of the distributorship agreement on July 1, 1963 until suit was commenced were held either in Australia or in California or Washington; none was held in Hawaii. Likewise, all correspondence

between the parties was between Australia and California or Washington; no correspondence between the parties was sent to or from Hawaii (R. 98).

The chronology of principal events shown by the record is:

Late January, 1963:

Initial contact between Robert Larkin, who later became half owner of plaintiff, and representatives of defendant at Newark, California and Seattle, Washington.

April, 1963:

Mr. Gould, general sales manager of Peterbilt, went to Australia to confer with Messrs. Larkin and O'Neil relative to their setting up Peterbilt distributorship in Australia.

May 10, 1963:

Mr. Larkin makes written "proposals" to Peterbilt for a Peterbilt distributorship for all Australia (R. 102-05).

May 31, 1963:

Plaintiff was incorporated in New South Wales (R. 64).

July 1, 1963:

Distributorship agreement between Peterbilt Motors Company and plaintiff (Peterbilt (Aust.) Pty. Ltd.) executed.

December, 1965

Defendant reaches decision to set up assembly plant for Kenworth trucks in Australia and phase out sale of Peterbilts to Australia.

January 6, 1966:

Meeting in Mr. O'Brien's office in Seattle with representatives of plaintiff regarding decision to set up assembly plant for Kenworth trucks in Australia. Plaintiff became Kenworth distributor effective that date.

March, 1966:

Mr. O'Brien went to Australia to announce to Australians defendant's plans to assemble Kenworth trucks there, to phase out the export of Peterbilts and to set up an Australian subsidiary.

July 15, 1966:

Kenworth Motor Trucks Pty. Ltd., a subsidiary of defendant, was incorporated in Victoria, Australia.

March 30, 1967:

Termination of the plaintiff as Kenworth and Peterbilt distributor in Australia became effective (R. 98-100).

B. Facts Relevant to Defendant's Motion to Change Venue Under 28 U.S.C. §1404(a) "For the Convenience of Parties and Witnesses, in the Interest of Justice"

In support of its alternative motion to change venue to the Western District of Washington, defendant, through Mr. O'Brien's affidavit, listed 45 potential witnesses who reside in the Western District, and identified the area of testimonial knowledge of each witness (R. 26-30). Defendant listed eleven additional witnesses, mostly from Northern California, for whom Seattle would be more convenient than Honolulu (R. 30-31).

Mr. O'Brien stated that of the eighteen members of the defendant's corporate staff who were listed in the affidavit, at least twelve had had discussions with representatives of plaintiff (R. 31). Hence, "if the trial were held in Honolulu, it would severely disrupt the operations of defendant, since an extended trial in Honolulu might require the presence in Hawaii of the top management of the company who, if the trial were held in Seattle, could continue to carry out their responsibilities during the trial, at least on a part-time basis". (R. 31-32).

Mr. O'Brien further pointed out that the corporate records are maintained in Renton, Washington, that the Kenworth Division records are kept principally in Seattle and the Peterbilt records are kept at Newark, California (R. 32). Mr. O'Brien analyzed (R. 32-34) four of the categories of documents which plaintiff had contended in its motion to produce were relevant to its action (R. 13-22). The expense and inconvenience to defendant of bringing these documents to Honolulu was demonstrated by the fact that Kenworth alone maintains some 1,000 file drawers of records pertaining to its operations and destroys some 300 file drawers of material annually (R. 32-33). Most of these documents would be relevant if plaintiff's motion for production were well taken (R. 32).

Plaintiff did not controvert Mr. O'Brien's affidavit. The only opposing material filed was an affidavit by counsel listing

six potential witnesses said to be connected with Hawaii. Of these, four were said to have had conversations with representatives of defendant (R. 85-86). One of these, J. Moir, was listed as living in "Honolulu, Hawaii". However, Mr. Moir, according to a letter dated October 27, 1967 attached to an affidavit of defendant's counsel, stated that he had not resided in Honolulu since January, 1964 (R. 88-90). Another of the six was simply identified as "George Reed, Director of L. C. O'Neil Trucks, Inc.". Reed was thus not claimed to have testimonial knowledge beyond the fact that he was a director of the Delaware corporation which owns a majority interest in the Australian plaintiff.

V. ARGUMENT

A. Defendant Does Not Transact Business in Hawaii Within the Meaning of Section 12 of the Clayton Act (15 U.S.C. §22)

The District Judge found that defendant transacted business in Hawaii and that it, therefore, could be sued in that jurisdiction under Section 12 of the Clayton Act (R. 106-111). That section provides:

> "Any suit, action, or proceeding under the antitrust laws against a corporation may be brought not only in the judicial district whereof it is an inhabitant, but also in any district wherein it may be found or transacts business; and all process in such cases may be served in the district of which it is an inhabitant, or wherever it may be found."

It is clear that defendant is not "found in Hawaii":

> "A corporation is 'found' within a district when it has an agent authorized to receive service of process, or when it may be deemed present within the district due to the presence of officers or agents carrying on the business of the corporation." 1 Moore's Fed. Prac. (2d ed. 1964) 1668, ¶0.144[15].

The fact that defendant is not "found" in Hawaii is recognized by plaintiff's motion for out-of-state service and the order thereon (R. 10-12).

The question, therefore, is whether defendant transacts business in Hawaii through its contacts with distributors there, an issue which depends upon common-law principles of agency. 1 Moore, supra, at 1666-67, ¶0.144[15]. Application of these principles, in turn, hinges on the degree of control reserved by defendant over the affairs of its distributors. When a venue defense is asserted, the burden rests upon the plaintiff to support the venue. United Industrial Corp. v. Nuclear Corp. of America, 237 F. Supp. 971, 979 (D. Del. 1964) and cases cited there.

In his written order denying defendant's motion, the District Judge cited several contacts by defendant with Hawaii which he held indicated that defendant transacted business there.

(1) Distributor's Agreement

It is well established that sale of products through a local distributor will not in itself provide a basis of jurisdiction over a foreign manufacturer. Sanders Assoc., Inc. v. Galion Iron Works & Mfg. Co., 304 F.2d 915, 920 (1st Cir. 1962) and cases cited there.

The Judge here held that by its agreements with its distributors, "Defendant's sales, services and warranty requirements are ... welded to each sale in Hawaii of its products." (R. 111). Whether defendant's "sales, services and warranty requirements are welded to each sale" would seem to be beside the point. The real question is whether defendant retains such controls that its distributors are its agents through whom it does business. The District Judge's conclusions on this score were based on mistaken reading of the distributor's contract.

The District Judge stated that "Hawaiian orders for its trucks and parts are placed with defendant through local distributors. Pacific Car has the option of accepting or rejecting a prospective purchaser's order. Once accepted, defendant processes and fills Hawaiian orders and makes delivery through its distributors." (R. 107-08). This implies that defendant sells to Hawaiian retail buyers, and that the distributors are defendant's agents. Neither is correct. As is shown by the agreements and by Mr. O'Brien's affidavit (R. 25, 35-42) defendant sells trucks to the distributors f.a.s. Seattle or Tacoma, Washington or San Francisco or Oakland, California and it is expressly agreed that the distributors are not defendant's agents for any purpose. (R. 24-25 and Sections 2 and 16 of the agreements).* Moreover, the fact that

*Amfac, Inc., the Kenworth distributor, could hardly be considered a controlled agent of Kenworth. It sells several other lines of trucks (R. 87).

a manufacturer reserves the right to accept or reject an order of a distributor would militate against an agency relationship. See e.g., Ohio-Midland Light & Power Co. v. Ohio Brass Co. 221 F. Supp. 405 (S.D. Ohio 1962).

The District Judge further stated, "Pacific Car has the absolute right to change prices and terms, as well as the construction and design of trucks, on any orders submitted, and the distributor is bound thereby." (R. 108). The Judge is mistaken. Defendant retains no such rights. The distributors are given an absolute right by Section 3 of the distributor's contracts (R. 35, 39) to cancel any order "as to which such price increase is applicable." Defendant reserves the right to make changes in design only in the narrow context that such changes result in "betterment" of the trucks. The provision does not indicate retention of controls by defendant, except in the very restricted sense that defendant cannot be forced by a distributor to retool its factory to provide designs which have been superseded.

The only other provisions cited by the District Judge to support his conclusion that the distributors are the agents of the defendant, rather than independent contractors, are provisions relating to warranties, maintenance of adequate sales and service facilities and the furnishing of information concerning sales (R. 108). Such provisions are standard in any distributor contract. If they constitute the control necessary to convert an independent dealer to an agent, then, contrary to case law, every

distributor is the agent of his manufacturer. The sweeping inference drawn by the District Judge that these provisions indicate "very substantial control" is simply unwarranted by the language of the agreements. Neither Kenworth nor Peterbilt maintains any control over the location, facilities or financial or other operations of a distributor. The distributor is left entirely on his own to develop his territory in any way he sees fit. He merely undertakes, by Section 11, to maintain sales and service facilities adequate "to meet the requirements of his trade." Examination of the precedents shows that the courts have required much more to sustain a holding that it is the manufacturer which is transacting the business done by its distributor. In fact, several courts have held that even the presence of a subsidiary of the defendant acting as a distributor in the forum district is insufficient to satisfy jurisdiction over a parent under Clayton Section 12, unless the parent company exercises control over the day-to-day operations of the resident corporation. Zwingle v. Tyson's Foods, Inc., 241 F. Supp. 940 (W.D. Okla 1965); see Fisher Baking Corp. v. Continental Baking Corp., 238 F. Supp. 322 (D. Utah 1965); School District v. Kurtz Bros., 240 F. Supp. 361 (E.D. Pa. 1965).

The case involving a manufacturer-distributor relationship which appears to present the clearest parallel to the instant facts is Ohio-Midland Light & Power Co. v. Ohio Brass Co., 221 F. Supp. 405 (S.D. Ohio 1962). The question there was whether the manufactur because of the terms of its contracts and contacts with its distributors, transacted business in the Southern District of Ohio for

purposes of venue under Section 12. Some of the facts pertaining to the relationship are quoted by the court from an affidavit filed by Lapp Insulator Company, the manufacturer, in support of its motion to dismiss:

> "'No officer, director or employee of Lapp resides in Ohio.
>
> "'No employee of said Company makes regular calls on customers within the Southern District of Ohio. Infrequent good will visits are made on individual customers, no attempt being made to cover all possible purchasers.
>
> "'Two independent concerns located in the Southern District of Ohio solicit orders for Lapp's products: for insulators, Harry Fisher Associates, Inc., having offices in Cleveland and Columbus, Ohio; for other products, White Industrial Sales and Equipment Company, having offices in Cincinnati, Ohio.
>
> "'Lapp has no ownership or financial interest in either of the above named concerns.
>
> "'All of Lapp's sales representatives, including Harry Fisher Associates, Inc. and White Industrial Sales and Equipment Company, are completely independent of Lapp. Lapp has no control over their location, facilities, financial operations, and the like. Such agents are compensated by a commission based upon consummated sales.
>
> "'Orders obtained by Harry Fisher Associates, Inc., White Industrial Sales and Equipment Company, and Lapp's other sales representatives must be accepted by Lapp at its offices in Le Roy, New York. Shipments are made by Lapp f.o.b. factory by common carrier directly to customers in Ohio from its plant in Le Roy, New York. Bills are sent directly to customers from Lapp's offices in Le Roy, New York.'" (221 F. Supp. at 406-07).

On these facts, the court held:

> "Even applying this broad definition of 'transacting business', this Court concludes that the contacts of defendant Lapp within this district

are not sufficient to constitute 'transacting business' within the district." (221 F. Supp. at 408).

On much the same facts as Ohio-Midland, a district judge in this circuit granted a manufacturer's motion to quash in Austad v. United States Steel Corp., 141 F. Supp. 437, 441 (N.D. Cal. 1956).

The opinion of the Eighth Circuit in Simpkins v. Council Mfg. Corp., 332 F.2d 733 (8th Cir. 1964), applying Missouri law, illustrates well the tests generally applied to determine propriety of venue founded on a manufacturer's relationship with its distributors. In affirming the district judge's ruling of dismissal for want of jurisdiction, the court quoted the following from the lower court's opinion:

> "'He, [the distributor] nevertheless, purchases equipment from numerous manufacturers and re-sells the same to customers in various parts of the contry, particularly in the midwest. Littrell is not an employee of Council Manufacturing Corporation, but operates as an independent contractor. All purchases of Littrell from defendant are at distributors prices, and Littrell re-sells to his customers at prices fixed by him. Defendant furnishes Littrell with advertising material regarding its machines but Littrell develops his own customers, conducts his own advertising, provides his own repair service to customers and is not subject to any direction, control or authority of defendant. Littrell purchases from defendant on his own account, normally attaches payment with the purchase order, and provides delivery of the equipment at the customer's cost.'" (332 F.2d at 735).

Also see Woodlawn Realty Corp. v. Smith-Scott Co., 226 F. Supp. 704, 705 (D. Mass. 1964) and Bruner v. Republic Acceptance Corp., 191 F. Supp. 200 (E.D. Ark. 1961).

the courts have sustained venue against manufacturers on the basis of day-to-day control over distributors within the forum district. Thus, in Volkswagen Interamericana, S.A. v. Rohlsen, 360 F.2d 437 (1st Cir. 1966), cert. den. 385 U.S. 919 (1966), the court denied a motion to dismiss, where it found, "Defendant's dealers were not mere buyers, or outlets for its products, but, as we have indicated, were subject to its detailed supervision and control". (360 F.2d at p. 440). Among the controls retained by the manufacturer, were,

> "... the right to control, inter alia the dealer's automobile and spare parts inventory, its area of distribution, the number of salesmen and customers' service personnel in its employ, and even its stationery and business forms." (360 F.2d at p. 440).

For another example, see Fiat Motor Co. v. Alabama Imported Cars Inc., 292 F. 2d 745 (D.C. Cir. 1961), cert. den. 368 U.S. 898 (1961).

(2) Visits to Hawaiian Distributors

The District Judge cited the following facts to support his conclusion that defendant transacted business in Hawaii:

> "Defendant's top management personnel have made goodwill, business expansion, and/or service visits to Hawaii from time to time, including: (1) three trips by Peterbilt's export sales manager between March 1964 and June 1965; (2) one trip to Hawaii by the general manager of Peterbilt in May 1965; and (3) one trip each by Peterbilt's general manager and general sales manager in June 1965 (R. 108).

The record is barren of evidence that any of the trips were for "business expansion". The only references to Hawaiian trips are in Mr. O'Brien's affidavit where he states that, "Infrequent

goodwill or service visits are made on Kenworth and Peterbilt distributors, generally in response to requests by such distributors" (R. 24) and in correspondence attached to Mr. O'Neil's affidavit (R. 79-83). The trips made to Hawaii by Peterbilt's export sales manager were made, according to the letter from the distributor to Mr. O'Neil, to provide "assistance in our promotion of sales of Peterbilt trucks in the Hawaiian Islands." (R. 79). Thus, the trips were made at the instance of the distributor to assist with its promotion. Such goodwill visits to distributors do not constitute the transaction of business under Section 12 of the Clayton Act. Ohio-Midland Light & Power Co. v. Ohio Brass Co. 221 F. Supp. 405, 406-07 (S.D. Ohio 1962); compare L.G. Reeder Contractors of Ariz. v. Higgins Industries, 265 F.2d 768 (9th Cir. 1959).

The circumstances of the 1965 trips are explained fully in the affidavit of Donald F. Pennell (R. 91-92). While in Hawaii in May, Mr. Pennell, then general manager of Peterbilt, discussed, at plaintiff's request, the possibility of Honolulu Iron Works investing in plaintiff. However, "nothing came of our conversation" (R. 92). The letter to Mr. O'Neil by Mr. Pennell (R. 80-81) was merely a report of the contact made with Honiron. Plaintiff makes no contention that this abortive attempt by it to seek outside capital has any nexus with its present claims.

Contrary to the opinion of the District Judge, this court has held that to support jurisdiction over a non-resident under Clayton Section 12, the plaintiff's cause of action must arise

from the activities of the defendant in the forum.

(3) The Cause of Action Did Not Arise from an Activity of Defendant in Hawaii

The District Judge, in his opinion, cited United States v. Scophony Corp., 333 U.S. 794 (1948), United States v. National City Lines, 334 U.S. 573 (1948) and Eastland Construction Co. v. Keasbey & Mattison Co., 358 F.2d 777 (9th Cir. 1966), as holding that, "under Clayton §12 the cause of action need not arise out of or result from activities of the defendant within the forum." (R. 109). None of the cited cases so holds. To the contrary, in each case there is reference to the legislative intent of Section 12 to give an antitrust plaintiff the opportunity to sue where the injury occurred. Thus, in Scophony, the Court interpreted the legislative purpose of Section 12:

> "Thereby it [Congress] relieved persons injured through corporate violations of the antitrust laws from the 'often insuperable obstacle' of resorting to distant forums for redress of wrongs done in the places of their business or residence. A foreign corporation no longer could come to a district, perpetrate there the injuries outlawed, and then by retreating or even without retreating to its headquarters defeat or delay the retribution due." (333 U.S. at p. 808).

The defendant in Scophony was a British firm which was accused of committing violations of the antitrust laws in the forum, the Southern District of New York. In National Van Lines, the Supreme Court quoted with approval the Scophony statement of Congressional intent as to Section 12. (334 U.S. 580).

some length the legislative and judicial history of Section 12. It concluded, citing Scophony and National Van Lines, along with Eastman Kodak Co. v. Southern Photo Co., 273 U.S. 359 (1927) that "... Congress's underlying assumption [in enacting Section 12 was] ... that antitrust injuries usually result from business activity of the corporate offender occurring in the victim's home district." (358 F.2d at 780).

The requirement that for venue purposes the cause of action against a non-resident corporation arise from activities in the forum district has been directly considered by this court in several cases, namely. L. D. Reeder Contractors v. Higgins Industries, Inc., 265 F.2d 768 (9th Cir. 1959); Kourkene v. American BBR, Inc., 313 F.2d 769 (9th Cir. 1963); Mechanical Contractors Assn. v. Mechanical Contractors Assn. of Northern Cal., 342 F.2d 393 (9th Cir. 1965) and Courtesy Chevrolet, Inc. v. Tennessee Walking Horse Assn., 344 F.2d 860 (9th Cir. 1965).

In Reeder, an action based on diversity of citizenship, this court analyzed at length the evolution of the concept of "doing business" in the law relating to jurisdiction over non-residents. The court enunciated and discussed three elements which must concur to support such jurisdiction. The second of these was stated to be

> "(2) The cause of action must be one which arises out of, or results from, the activities of the defendant within the forum. It is conceivable that the actual cause of action might come to fruition in another state, but because of the activities of defendant in the forum state there would still be a 'substantial minimum contact.'" (265 F.2d 768, 773-74, footnote 12).

The three requirements of Reeder were cited and applied in the Kourkene and Mechanical Contractors cases, neither of which involved Section 12 of the Clayton Act. The most recent case wherein this court adhered to and applied the three rules was a Section 12 case, Courtesy Chevrolet, Inc. v. Tennessee Walking Horse Assn., 344 F.2d 860, 865-66 (9th Cir. 1965). The District Judge in the instant case held that the application of the Reeder rules in Courtesy to be dicta (R. 110). We respectfully disagree. We cannot understand why, if satisfaction of the second Reeder requirement was not deemed necessary in Courtesy, the court made so much of the fact that the alleged violations occurred in the forum district. On page 864, the court states that defendants' argument ignores its contacts in California, "and even more important it overlooks the fact that even though the Association otherwise operated in California by mail, by mail it deliberately and incentionally brought about in California the very injuries now complained of." (Italics in original). If the requirement that the contacts within the forum give rise to the injuries were somehow a makeweight of no concern in a Section 12 case, why, one might reasonably ask, was the court speaking of it being "even more important" than any other consideration; what message was the court intending to deliver by italicizing the fact that the defendants' violation had caused injury in California? If there were any doubt, it is dispelled by the court's ultimate holding on page 866, after citing the three Reeder requirements, "We conclude that the claims of the appellant arise out of or result from just such acts and transactions [in the forum]." This ultimate holding in a

long, carefully written opinion would be a meaningless non-sequitur if there were no requirement in a Section 12 case that the acts of defendant in the forum give rise to the cause of action.

(4) Defendant's Activities in Hawaii Do Not Satisfy Second Reeder Requirement

The District Judge stated in his opinion, "Plaintiff's American promoter was a resident of Hawaii at the time he entered into negotiations and had discussions and visits in and out of Honolulu with the representatives of Peterbilt concerning its subsequent contract with plaintiff." (R. 108-09). For this statement the judge cites four letters (R. 67-72). None of these indicates any negotiation with defendant in Honolulu concerning a possible Peterbilt franchise. They do show, as is more particularly demonstrated by the affidavit of Mr. O'Brien (R. 93-95), that Mr. Larkin talked in general terms with representatives of defendant in Seattle and Newark, California in late January, 1963 concerning his plans for Australia.

It seems to us, however, that all of these preliminary talks are quite beside the point. In Eastland Construction Co. v. Keasbey & Mattison Co., 358 F.2d 777, 780 (9th Cir. 1966), this court held:

> "Nevertheless, we conclude that under section 12 of the Clayton Act, venue is properly laid against a corporate defendant in any district in which the defendant was transacting business when plaintiff's cause of action accrued."

The inference is unmistakeable from Eastland that activities by a defendant in a forum which antedate accrual of the action are

not weighed in the transacting business scale.* Under Eastland Mr. Larkin's residency in Hawaii until mid-March of 1963, and the fact that communications were addressed by defendant to him there in February and March, 1963 should be irrelevant to the issue of whether defendant transacts business in Hawaii for purposes of amenability to suit there for a cause of action arising from a distributor's contract dated July 1, 1963 (R. 6), made by defendant with a corporate plaintiff which was not even born until May 31, 1963. Exhibits "A" through "H" to Mr. O'Neil's affidavit, relied upon by the District Judge to support his finding that defendant transacts business in Hawaii, are all dated before May 31, 1963, the date when plaintiff began its corporate life (R. 98). Plaintiff does not purport to sue on an assigned claim, or argue that its cause of action accrued while it was still in the womb of time.

B. The District Judge Should Have Transferred The Action to the Western District of Washington

Section 1404(a) provides as follows:

> "For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought."

Since the defendant is a Washington corporation with its corporate offices and several of its plants located in the Western District of Washington, the action could unquestionably have been

* During oral argument the District Judge expressed disdain for the "antitrust experience and ... antitrust decisions" of the author of the Eastland opinion, observing that, "upon one occasion I construed some of his words as dicta." (Tr. 57-58). The District Judge's ultimate decision indicates that he gave little or no credit to Eastland.

brought there. Defendant also has factories in Newark, California and Kansas City, Missouri. Counsel for plaintiff conceded in argument that the "case could have been tried in a few other forums, but the question that this Court has to decide on the moving papers before it now is, is it the home park of the defendant or in a neutral forum such as Hawaii". (Tr. 40).

The District Judge devoted only one relatively short paragraph to defendant's motion under Section 1404(a). The reasons he assigned for denial of the motion were:

1. The motion should be denied until the burdens and expenses by defendant became realities.
2. Modern techniques of duplicating records and deposing witnesses would reduce defendant's costs and inconvenience in conducting this litigation in Hawaii.
3. The plaintiff's choice of forum should not be lightly set aside.
4. Transfer would "further burden this foreign plaintiff who has chosen the American forum nearest its home base...." (R. 112-13).

In our view if the foregoing reasons are deemed sufficient to deny transfer, under the instant facts, then Section 1404(a) is a dead letter. Our reasons follow:

1. The District Judge stated that "at this stage of the litigation it is impossible for this court to ascertain ... the burden which defendant may incur." (R. 112).

This is a little like saying that there's no sense avoiding a known fire hazard because until the barn burns no one can adequately evaluate the damages to be incurred. Defendant's evaluation of its potential damage was as definite as it could possibly be before the fact. It named 45 potential witnesses who resided in the Western District of Washington, gave their home addresses and indicated the probable areas of their testimony (R. 26-30). It named eleven more witnesses for whom Seattle would be a much more convenient forum (R. 30-31). It stated the round-trip air fare to Honolulu and estimated total travel expense. It predicted that subsistence for these 56 witnesses in Honolulu "would be extremely expensive", a fact which we believe should be judicially noticeable. It pointed out that the key witnesses for defendant would be the people who run the defendant's business and stated the obvious fact that trial in Honolulu would "severely disrupt the operations of defendant" (R. 31). It took plaintiff's motion for production of documents at face value and analyzed the nature and number of the records which might probably be needed in Honolulu (R. 32-34).

To counter this, plaintiff filed an affidavit listing six potential witnesses connected with Hawaii. Plaintiff had to reach awfully hard to find six. One of the six, J. Moir, states that he has not lived in Honolulu since January, 1964 (R. 90). Another, George Reed, is not asserted to have knowledge of any relevant fact, but merely serves as a director of the Delaware corporation which controls the Australian plaintiff (R. 86).

exercise his discretion on the motion to transfer. Rather, he suggested that the 56 witnesses be deposed (R. 112), that the 1,000 or more file drawers of records (R. 32-33) be copied by "modern document duplicating equipment" (R. 112), and assessment of the damages to defendant be postponed. Under this ruling defendant will presumably only be able to make the necessary showing in time to move the case closer to home for post-trial motions.

One is reminded of the observation of the Fourth Circuit in General Tire & Rubber Company v. Watkins, 373 F.2d 361, 370 (4th Cir. 1967), where in granting a petition for mandamus it said,

> "It is obvious that if we postpone action until appeal after final judgment, the question will have become moot and the damage done...."

2. The District Judge's statement that, "the plaintiff's choice of forum should not be lightly set aside" (R. 112) while correct as a generality, has little application to the instant case.

Plaintiff's choice of venue is entitled only to minimal consideration where, as here, the plaintiff is not a resident of the district and such contacts as defendant has with the forum district are irrelevant to the subject matter of the litigation. Typical of the many holdings supporting this principle is the following excerpt from the opinion of District Judge MacMahon in Polaroid Corp. v. Casselman, 213 F. Supp. 379, 383 (S.D. N.Y. 1962):

"In view of this all but complete lack of nexus with the forum, suit in this district can only be justified on the basis of the venue privilege given plaintiff by Sections 16(b) and 27 of the Securities Exchange Act of 1934. Normally plaintiff's choice of a technically proper venue is accorded some weight in the court's determination of the propriety of a transfer under 28 U.S.C. §1404(a). Judicial reluctance to disturb the plaintiff's choice, however, is a vestige of the harsh consequence of dismissal under the old doctrine of forum non conveniens. But an asserted right to choice of forum is, at best, a bootstrap argument under Section 1404(a) for if accorded decisive significance no action would ever be transferred. Thus, it is only one factor to be considered and is entitled to no weight whatever where it appears that the plaintiff was forum shopping and that the selected forum has little or no connection with the parties or the subject matter.

"As we have shown, this forum has no real connection with this litigation. It was imported here for no reason other than forum shopping."

Also see Chicago, Rock Island and Pac. Railroad Co. v. Igoe, 220 F.2d 299, 304 (7th Cir. 1955), cert. den. 350 U.S. 822 (1955) holding that judge abused discretion in refusing transfer under Section 1404(a)); Cressman v. United Air Lines, 158 F. Supp. 404, 407 (S.D. N.Y. 1958); Glenn v. Trans World Airlines, Inc., 210 F. Supp. 31 (E.D. N.Y. 1962); Morgan v. Illinois Central Railroad Co., 161 F. Supp. 119, 120 (S.D. Tex. 1958) and cases cited in 1 Moore's Fed. Prac. (2nd ed. 1964) 1778, fn. 5, ¶0.145[5].

The record shows that defendant would be greatly inconvenienced by trial in Honolulu. It is axiomatic in the determination of motions under Section 1404(a) that "a plaintiff may not by choice of an inconvenient forum 'vex', 'harass', or 'oppress' the

defendant by inflicting upon him expense or trouble not necessary to his own right to pursue his remedy." Pepsi-Cola Co. v. Dr. Pepper Co., 214 F. Supp. 377 (W.D. Pa. 1963); Gulf Oil Corp. v. Gilbert, 330 U.S. 501 (1946); United States v. Gerber, 86 F. Supp. 175 (E.D. Pa. 1949).

3. The District Judge stated that defendant's inconvenience and expenses could be mitigated by "the availability of modern duplicating equipment and depositions" (R. 112).

This statement overlooks the self-evident facts that depositions are a poor substitute for live testimony, that defendants could hardly anticipate in pretrial depositions all of the plaintiff's case which might need rebuttal, and that defendant would necessarily incur expenses in duplication of records and shipment of them to Hawaii, which expense would be largely unnecessary if the trial were held in Seattle.

In Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 511 (1946), a leading case on forum non conveniens, the Court said:

> "Certainly to fix the place of trial at a point where litigants cannot compel personal attendance and may be forced to try their cases on deposition, is to create a condition not satisfactory to court, jury or most litigants."

In Polaroid Corporation v. Casselman, 213 F. Supp. 379, 382 (S.D. N.Y. 1962) the court was presented with the contention that transfer was unnecessary, because of the availability of deposition The court's statement rejecting this argument applies directly here

> "Depositions, deadening and one-sided, are a poor substitute for live testimony especially where, as here, vital issues of fact may hinge on credibility. In determining credibility, there is nothing like the impact of live dramatis personae on the trier of the facts. Thus, the transfer which defendant seeks will not only serve the convenience of the witnesses but, more importantly, the ends of justice."

Also see Ford Motor Co. v. Ryan, 182 F.2d 329, 331 (7th Cir. 1950).

As for the point that defendant can copy all of its records and set up a duplicate record system in Hawaii, courts have always looked to the location of corporate books and records as an important factor in determining issues of transfer. United States v. Gerber, 86 F. Supp. 175 (E.D. Pa. 1949); and General Felt Products Co. v. Allen Industries, Inc., 120 F. Supp. 491 (D. Del. 1954). See Gulf Oil Corp. v. Gilbert, supra at page 508 ("relative ease of access to sources of proof" as an "important consideration").

Most of the foregoing cases were decided before enactment of Section 1404(a), which significantly liberalized the conditions under which transfers would be granted. In Norwood v. Kirkpatrick, 349 U.S. 29, 32 (1955), the Supreme Court held that,

> "... Congress, by the term 'for the convenience of parties and witnesses, in the interest of justice,' intended to permit courts to grant transfers upon a lesser showing of inconvenience."

Where the great majority of witnesses reside, as they do in this case, 2,700 miles from the forum, and where the great majority of the records are maintained there, it would seem no

answer to a motion to transfer, that the witnesses could all be deposed and the documents duplicated. It is to prevent this very type of inconvenience and expense that Section 1404(a) was enacted

4. The District Judge stated that transfer would "further burden this foreign plaintiff who has chosen the American forum nearest its home base." (R. 112-13).

The statement of burden to "this foreign plaintiff" is based purely upon the fact that the plaintiff was incorporated in New South Wales, Australia, and the assumption that its witnesses would be coming from there. Plaintiff did not choose to file any affidavit whatsoever relating to its convenience. In similar circumstances Chief Judge Leahy said in General Felt Products Co. v. Allen Industries, 120 F. Supp. 491, 493 (D. Del. 1954):

> "Plaintiff stands pat on its selection of forum.... If plaintiff chooses to stand mute, making no profert of his conveniences, or the justice impact on him, he assumes the risk of defendant's overcoming counter-choice of forum by a favorable balance of §1404(a)'s factors."

The District Judge's statement as to "burden" on the Australian plaintiff does not rest upon any showing as to the number of potential witnesses from Australia, but purely and simply upon the undeniable fact that Hawaii is a more or midway "neutral" forum. The idea of a neutral forum, strange to both parties, but midway between their places of residence, has been advanced and rejected repeatedly, on the ground that since at least one party has to travel there is no sense in making the trial equally inconvenient for both. Paragon-Revolute Corp. v. C. F. Pease Co., 120

F. Supp. 488 (D. Del. 1954); Pepsi-Cola Co. v. Dr. Pepper Co., 214 F. Supp. 377 (W.D. Pa. 1963); River Company, Inc. v. Texas Eastern Transmission Corp., 1954 Trade Cases, ¶67, 840 (S.D. N.Y. 1954); General Felt Products Co. v. Allen Industries, 20 F. Supp. 491 (D. Del. 1954).

In the Paragon case, the court said, in granting transfer from Wilmington to Chicago:

> "In the case at bar the forum is neither the residence nor a place of business of either party. Both corporate parties, through counsel, officers and employees, will have to come here from foreign jurisdictions with all the documentary and physical evidence -- in the form of cumbersome physical machinery -- they deem necessary for trial. Plaintiff must travel from Rochester and defendant from Chicago. This legal ball game cannot be played in both home parks, and cannot be scheduled for Rochester because the suit could not have been brought there originally. One home field, Chicago, and neutral Wilmington remain two possibilities. As between them, I conclude conveniences favor Chicago. That is defendant's executive and manufacturing situs and will eliminate one party's travel, for plaintiff will have to travel in any event, either to Chicago or Wilmington." (120 F. Supp. at p. 490).

In the Pepsi-Cola case Judge Willson said, in granting transfer from Pittsburgh to Dallas:

> "As is required under the statute, where is the convenience of the parties and witnesses in this case? Is it Pittsburgh or is it Dallas? In the first place, I have not overlooked the privilege that the plaintiff has in selecting a forum. That privilege, as Judge Murphy said, continues to play a part in deciding transfer motions. But it should not be cast in the leading role. Plaintiff has chosen to leave its own 'home grounds' so to speak. It might have gone on to Dallas, but stopped at Pittsburgh. When

> inquiry was made at the first time I heard this case as to why Pittsburgh was selected, counsel for plaintiff said, "It is neutral ground'. However, neutral ground plays no part in the decision unless it can be said that the interest of justice requires that the case be tried not in the state where either of the parties has its principal place of business. I take it that each party will receive a fair trial before any United States District Court. If the case were tried in Pittsburgh any business records which plaintiff would introduce from its main office would have to be transported here. It is the same for defendant. So far as the parties executive officers who may be witnesses are concerned, they must come to Pittsburgh either from New York or Dallas if the case stays here. Scheduled jet airtime from New York to Dallas is around two and one-half hours. It is one hour from New York to Pittsburgh. If plaintiff's witnesses are to leave New York, why not overfly Pittsburgh and continue on to Dallas and take their records with them." (214 F. Supp. at 382).

C. Mandamus Is An Appropriate Remedy

There is no question that this court has the power to compel action by a district court by means of a writ of mandamus. 28 U.S.C. §1651(a) provides that:

> "The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law."

The scope of Section 1651 is stated in 6 Moore's Fed. Prac. (2d ed. 1966) 86-87, ¶54.10[4] to be as follows:

> "... under §1651 a court of appeals may issue an appropriate writ, such as mandamus, prohibition, common law certiorari, habeas corpus, injunction, in aid of its exercised jurisdiction, or its then existing, or the prospective appellate jurisdiction which Congress has given it over district courts and administrative boards and agencies.

> "Under the latter alternative dealing with the court's prospective appellate jurisdiction, an appropriate writ may issue to review a non-appealable interlocutory order of the district court where the court of appeals has appellate jurisdiction over a final judgment rendered in the case and it is improper to postpone review until an appeal is taken from the final judgment."

Review of a district court's order on motions under 28 U.S.C. §§1404(a) or 1406(a) is a proper application of the mandamus power. 6 Moore, supra, at 96-101, ¶54.10[4].

This court has held, consistent with the general rule, that it has power to issue writs of mandamus to review orders under 28 U.S.C. §1406(a), Gulf Research & Development co. v. Harrison, 185 F. 2d 457 (9th Cir. 1950), and 28 U.S.C. §1404(a), Shapiro v. Bonanza Hotel Co., 185 F.2d 777 (9th Cir. 1950). See American Concrete Agricultural Pipe Assn. v. No-Joint Concrete Pipe Co., 331 F.2d 706 (9th Cir. 1964).

The only difference in criteria for review of orders under Section 1406(a) and Section 1404(a) would appear to be that no discretion is invested in the District Judge in passing on a motion under the former statute. Here, the crux of the District Judge's decision was that full consideration of the motion under Section 1404(a) should be deferred. In a real sense, therefore, the Judge did not exercise his discretion. He did not apply the statutory criteria to the facts of the case. To the extent to which he could be said to have done so, he used erroneous standards and abused his discretion. There is general agreement that a decision under Section 1404(a) which shows either abuse of discretio

or is "clearly erroneous" or "arbitrary" should be reviewed on a petition for writ of mandamus. See cases cited in A. Olnick & Sons v. Dempster Brothers, Inc., 365 F.2d 439 (2nd Cir. 1966).

Appeal is not a meaningful remedy for the error involved here, since the present order is not appealable, American Concrete Agricultural Pipe Assn., supra, and appeal from a final judgment would come too late to be of any value. In granting a petition for mandamus requiring transfer, the Fourth Circuit in General Tire & Rubber Company v. Watkins, 373 F.2d 361, 370 (4th Cir. 1967), observed,

> "It is obvious that if we postpone action until appeal after final judgment, the question will have become moot and the damage done....
>
> "We are not here permitting use of mandamus as a substitute for interlocutory appeal, which is, with a few statutory exceptions, prohibited in the federal courts. See 28 U.S.C. §§1291-92. Rather, we are using the writ for a purpose for which we think it was intended - to correct a wrong to the court which otherwise can never be effectively presented on appeal. The order of the district court is reversed; the writ will be issued."

This court has held that the situation presented by this petition is a proper one for review by mandamus. In Shapiro v. Bonanza Hotel Co., supra, the court held,

> "... we feel that under the particular facts of this case, and the matter being only one of form, we may properly treat this appeal as though it were a petition for a writ of mandamus. This court has power to issue the writ in aid of its

appellate jurisdiction. While it is true that the writ is an extraordinary remedy to be applied with caution we are of the opinion that sufficient grounds exist here to issue the writ if it clearly appears that the district court was in error. Appellant has made a strong showing for a change of venue under the doctrine of forum non conveniens and has raised an important question of law in regard to the circumstances under which the statutory embodiment of that doctrine may be invoked." (185 F.2d at 779).

Mandamus to correct erroneous orders relating to venue has been granted in cases very similar to the present one. In Chicago, Rock Island & Pac. R. Co. v. Igoe, 220 F.2d 299 (7th Cir. 1955), the court issued a writ of mandamus compelling transfer. The statement of controlling issues closely parallels this case.

> "Factors under the statute which demonstrate that a transfer should be made are: convenience of witnesses of both plaintiff and defendant; the ease of access to sources of proof; the availability of compulsory process to compel the attendance of unwilling witnesses; the smaller amount of expense required for willing witnesses; the availability of a view of the premises; the congestion of the District Court calendar in the Northern District of Illinois, Eastern Division; that no controverted issue of fact depends upon any event that occurred in the Northern District of Illinois; and the burden of a jury trial should not be imposed upon the Northern District of Illinois, an area which has no relation to the litigation." (220 F.2d at 304).

The ground of the court's decision was that

> "The balance of convenience of the parties is so overwhelmingly in favor of the defendant that we hold the denial by respondent of the motion to transfer this case to the Southern District of Iowa was so clearly erroneous that it amounted to an abuse of discretion." (id. at 305).

See also Koehring Company v. Hyde Construction Company, 324 F.2d 295 (5th Cir. 1963), in which transfer was ordered on grounds essentially identical to those in Chicago & Rock Island, supra. In each of those cases, one party resided in the district from which the action was ordered transferred; in the present case even that contact is absent. And see Southern Ry. Company v. Madden, 235 F.2d 198 (4th Cir. 1956) in which the court found abuse of discretion even though the original forum was more convenient for plaintiff's attorneys and several witnesses.

This case presents many extraordinary factors which call for the exercise of this court's power to issue mandamus. In most of the mandamus cases the choice of forum has been between two mainland cities a few hundred miles apart; here defendant would be compelled to travel 2,700 miles on or over water to defend itself. In most of the cases the choice is between the district where plaintiff resides and the home of the defendant; here Honolulu is the residence of neither. In most of the cases the forum selected by the plaintiff has some connection with the facts asserted; here concededly it has none.

VI. CONCLUSION

Plaintiff's position in resisting transfer was stated by its counsel to be as follows:

> "MR. BLECHER: If it please the Court, we can strip the present motions of the legal verbiage and really take a hard look at what we're talking about. It seems to me readily apparent that we have here some maneuvering by the defendant to,

> by one means or another, determine where this ball game is going to be played; and basically what is before the Court, since there isn't any way it can be played in the plaintiff's park, is for the Court to determine whether or not we're going to be forced to play in the defendant's park in Seattle ... or whether this plaintiff is going to be able to get a shot at at least a neutral park like Honolulu." (Tr. 39).

A moment later counsel for plaintiff, a San Francisco practitioner, conceded that the case "could have been started in the Northern District of California or Kansas City or anywhere else." (Tr. 40).

Thus, one is left to speculate whether what the real reason might be for selecting Hawaii. The possible justification, inadequate though it may be, that Hawaii is the American forum closest to Australia loses most of its force when one considers that a controlling interest in plaintiff is held by a Delaware corporation. Further, plaintiff might reasonably have assumed, when it entered into a Distributor's Contract with the Peterbilt Motors Company of Newark, California, a division of Pacific Car and Foundry Company, of Seattle, Washington, that if the time ever came when it needed to enforce any rights it might have under American law, that it might have to come to California or Washington.

There is no justification for retaining this case in Hawaii. What this court said about the defendant in L. D. Reeder Contractors of Arizona v. Higgins Industries, 265 F.2d 768, 776 (9th Cir. 1950) applies directly here:

"We think a consideration of these factors leads us to the inescapable conclusion that as to appellee Higgins, the 'estimate of inconvenience' weighs heavily in its favor. We need not point out again the slim thread of facts which connects Higgins with the forum state which the appellant has chosen."

The threads which connected Higgins with the State of California were substantial indeed compared with the minimal contacts of defendant here with the State of Hawaii.

Respectfully submitted,

CHUNG, VITOUSEK, CHUCK & FUJIYAMA
ROY A. VITOUSEK, JR.
304 International Savings Building
1022 Bethel Street
Honolulu, Hawaii 96813

HELSELL, PAUL, FETTERMAN, TODD & HOKANSON

By _____
RICHARD S. WHITE
1610 Washington Building
Seattle, Washington 98101

Attorneys for Petitioner

RSW:CK
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